No. 20-10843

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATHANIEL WOODS,

Plaintiff-Appellant,

v.
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, WARDEN, HOLMAN CORRECTIONAL FACILITY, ATTORNEY GENERAL, STATE OF ALABAMA,

Defendant-Appellees.

PRINCIPAL BRIEF OF APPELLANT

On Appeal from the United States District Court
for the Middle District of Alabama, Northern Division
Case No. 2:20-cv-00058-ECM

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EXECUTION SCHEDULED FOR MARCH 5, 2020 AT 6:00 P.M.

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel certifies the following persons may have an interest in the outcome of this case:

Briles, Rita – Trial counsel for Appellant;

Carroll, John – Counsel for Appellant in state post-conviction proceedings;

Collins, Michael – Victim;

Coogler, L. Scott – United States District Court judge;

Davis, LaJuana – Counsel for Appellant in state post-conviction proceedings;

Dunn, Jefferson – Appellant; Commissioner, Dept. of Corrections;

King, Troy – Counsel for State in direct appeal and post-conviction proceedings and former Attorney General of Alabama;

LaCour Jr., Edmund G. – Counsel for State in federal habeas appellate proceedings and Alabama Solicitor General;

Lloyd, J.D. – Counsel for Appellant in federal habeas proceedings and § 1983 litigation;

Marks, Emily C. – United States District Judge;

Marshall, Steve – Appellant; Attorney General for the State of Alabama; counsel for State in federal habeas appellate proceedings and § 1983 litigation;

Matthews, Robert – Counsel for Appellant in federal habeas appellate proceedings;

McCammon, Shane – Counsel for Appellant;

Nail, Tommy – Trial judge, Jefferson Circuit Court.

Roberts, Jasper B., Jr. – Counsel for State on direct appeal and Assistant Attorney General of Alabama;

Reiland, Stephanie E. – Assistant Attorney General and counsel for State in state post-conviction relief proceedings;

Shapiro, Marc R. – Counsel for Appellant;

Simpson, Lauren A. – Assistant Attorney General of Alabama; counsel for State in state post-conviction relief and federal habeas proceedings; counsel for Appellees in § 1983 litigation;

Stewart, Cynthia – Appellant; Warden, Holman Correctional Facility;

Strange, Luther – Counsel for State in state post-conviction relief proceedings;

Threatt, Glennon Fletcher, Jr. – Counsel for Appellant on direct appeal; and

Umstead, Cynthia – Trial counsel for Appellant.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Nathaniel Woods respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Rule 28-1(c) of the Eleventh Circuit Rules. This is a capital case in which the death penalty has been imposed. Mr. Woods is scheduled to be executed on March 5, 2020 via lethal injection and has requested a stay from this court. The State of Alabama has scheduled Mr. Woods' execution based on the arbitrary and erroneous determination that he knowingly and voluntarily did not choose to be executed via nitrogen hypoxia—a decision he did not make due to the State's unconstitutional withholding of vital information. Appellees have violated Mr. Woods' rights under the Eighth and Fourteenth Amendments, the Alabama State Constitution, and Alabama state law.

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STATEMENT OF JURISDICTION

Jurisdiction for this § 1983 proceeding was proper in the United States District Court for the Middle District of Alabama under 28 U.S.C. § 1331, because Mr. Woods' claims arise under the Constitution and laws of the United States. The District Court also had supplemental jurisdiction, pursuant to 28 U.S.C. § 1637(a), to adjudicate Mr. Woods' state-law claims, which are related to and form part of the same controversy created by Appellees' ongoing violations of the Constitution and laws of the United States. Further, Mr. Woods' claims do not involve a novel or complex interpretation of Alabama law, nor do they predominate over Mr. Woods' federal claims. *See* 28 U.S.C. § 1367(c). The district court entered final judgment against petitioner as to all claims on March 2, 2020. On March 3, 2020, Mr. Woods filed a timely notice of appeal. Jurisdiction in this Court is proper under 28 U.S.C. §§ 1291, 1294(1), and 2253(a).

STATEMENT OF THE ISSUES

I. Did the State violate Mr. Woods' Eighth Amendment right to be free from arbitrary imposition of the death penalty when, unlike fourteen (14) other inmates on death row who still do not have execution dates (despite their federal habeas proceedings having been completed for months), it targeted Mr. Woods for execution based on his supposed "choice" of lethal injection (over nitrogen gas), notwithstanding that the State withheld vital information

bearing upon that decision—namely, that it, in fact, had no means of executing inmates via nitrogen gas and would proceed with executions it could still carry out?

II. Did the State violate Mr. Woods' Fourteenth Amendment right to due process when it failed to disclose—and actively withheld—the material facts that, during the June 2018 election period, the State did not have a nitrogen-hypoxia protocol in place, that any death-row inmate who elected to die via nitrogen would have his execution stayed until a protocol was implemented, and that the State would be deviating from its long-standing policy of scheduling executions based only on when an inmate exhausted his judicial review?

III. Did the State violate Mr. Woods' Fourteenth Amendment right to equal protection by treating him differently than the fourteen (14) other death-row inmates who have exhausted their judicial review, on the sole basis that the other inmates stumbled into a right under Alabama state law whereas Mr. Woods did not?

IV. Did the State violate Mr. Woods' rights under Alabama state law by fraudulently misrepresenting and suppressing material information to the detriment of Mr. Woods, who now faces looming death as a result of the State's unlawful silence?

V. When it adopted a new policy of scheduling executions based on whether the inmate opted into dying via nitrogen hypoxia, did the State violate the Alabama Administrative Procedure Act by failing to provide the statutory-required notice and opportunity for public comment?

INTRODUCTION

Consider this scenario: prison officials ask inmates to choose between green shirts and yellow shirts. They have four weeks in which to make the choice. With no further information, the inmates naturally choose their preferred colors. Some choose green. Some choose yellow. A year and a half later, it comes to light that the Attorney General is exercising his discretion to execute only green-shirted inmates. The Eighth and Fourteenth Amendments would prohibit such arbitrary, capricious, and discriminatory treatment. And the Due Process Clause would preclude the State from withholding such information and claiming it is simply honoring each inmate's "choice." That, of course, would be no choice at all. If these facts would void (or nullify) a basic contract, they certainly should give this Court pause in assessing the State's decision on who should be executed. Accordingly, in most any setting, courts would recognize the suppression of such vital information necessitates unwinding the contract—only more so when constitutional rights are at stake.

That is precisely what is playing out in the State of Alabama. In June 2018, the State told inmates to choose between lethal injection and nitrogen gas. They had thirty days. With what information they had available, some chose lethal injections; others chose nitrogen gas. Others simply declined to participate in their own execution process and made no choice at all. In the months following that 30-day time period, the State first moved to execute a couple inmates whose federal habeas proceedings had been completed. The State appeared to be focusing its execution efforts on inmates scheduled to die by lethal injection but, with such a small sample size, there was no way to definitively know. Then came the execution of Jarrod Taylor.

In the summer of 2019, the State moved to set Mr. Taylor's execution. In so doing, the State represented that Mr. Taylor had chosen nitrogen gas. The State was mistaken. Mr. Taylor's counsel apprised the Attorney General's Office as much. The State then moved to withdraw Mr. Taylor's execution, explaining, "ADOC is not yet prepared to proceed with an execution by nitrogen hypoxia" because it does not have—nor has it ever—a protocol in place. But what the State could not withdraw was its unintended disclosure that it was now singling out for execution inmates scheduled to die by lethal injection.

Though fourteen other inmates (whose federal habeas proceedings had been exhausted) were awaiting execution at the time these events played out for Jarrod

Taylor in August 2019, the State did not—and has not—moved to execute any of them. That's because they all chose nitrogen gas. Instead, the next execution date the State pursued was Nathaniel Woods', whose certiorari petition was denied by the United States Supreme Court a little over a month later on October 27, 2019, making his claims of arbitrary treatment and suppressed information ripe. This Court must not sanction the State's unlawful actions.

STATEMENT OF THE CASE

Prior Proceedings & Proceedings Below

On October 2005, Mr. Woods was convicted of capital murder and sentenced to death. *E.g.*, Appendix, Ex. 10 at 2. His convictions and sentence were affirmed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. *Id.* at 2-3 (citing *Woods v. State*, 13 So. 3d 1 (Ala. Crim. App. 2017). The United States Supreme Court denied certiorari. *Id.* at 3 (citing *Woods v. Alabama*, 559 U.S. 942 (2010) (mem.)).

Mr. Woods filed a Rule 32 petition for postconviction relief, which the circuit court summarily dismissed on December 1, 2010. *Id.* The Alabama Court of Criminal Appeals affirmed the dismissal of Mr. Woods' Rule 32 petition, and the Alabama Supreme Court denied certiorari. *Id.* (citing *Woods v. State*, 221 So. 3d 1125 (Ala. Crim. App. 2016).

Mr. Woods then filed a petition for habeas corpus under 28 U.S.C. § 2254 in October 2016, which was denied in July 2018. *Id.* at 3-4. He then moved in the Eleventh Circuit Court of Appeals for a certificate of appealability, which was denied in February 2019. *Id.* at 4. The U.S. Supreme Court denied certiorari on October 7, 2019. *Id.* (citing *Woods v. Stewart*, 140 S.Ct. 67 (2019) (mem.)).

On October 29, 2019, the State moved the Alabama Supreme Court to set an execution date, specifically requesting that Mr. Woods be executed via lethal injection. *Id.* at 36. Mr. Woods opposed the motion on December 5, 2019.

Mr. Woods filed the instant Complaint pursuant to 42 U.S.C. § 1983 on January 23, 2020—a full week before the Alabama Supreme Court scheduled his execution, forty-three (43) days before that execution is due to take place, and nearly six (6) weeks ago. *E.g.*, Ex. 2 at 1. In his Complaint, Mr. Woods alleges that Appellees violated his rights under the U.S. Constitution, Alabama state constitution, and Alabama state law by wrongfully withholding from him the vital fact that electing—during June 2018—to die via nitrogen hypoxia was choosing to live indefinitely, whereas not so electing was an unknowing and involuntary choice for rapidly looming death. Ex. 2 at ¶¶ 72-115.

On January 30, 2020, the Alabama Supreme Court scheduled Mr. Woods' execution for March 5, 2020. *E.g.*, Ex. 10 at 9.

On February 6, 2020, Appellees moved for summary judgment on the Complaint. *Id.*

On February 7, 2020, Mr. Woods petitioned the Alabama Supreme Court to temporarily stay his execution. *Id.* at 45. The Alabama Supreme Court summarily denied the petition on February 14, 2020. *Id.*

Believing there were no genuine issues of material fact—and wanting to give the district court sufficient time to reach the merits of his claims—Mr. Woods expeditiously cross-moved for summary judgment in the district court on February 13, 2020. *See id.* at 9. As a prophylactic measure and as a courtesy to the district court, Mr. Woods submitted a stay motion in the lower court on February 24, 2020 while simultaneously maintaining that the court had before it the necessary facts to reach the merits with enough time to permit this Court to review any forthcoming appeal. *See* Ex. 9 at 82.

On March 2, 2020, at 3:31 p.m. Central Standard Time, the district court granted Appellees' motion for summary judgment, denied Mr. Woods' cross-motion for summary judgment, and denied Mr. Woods' motion for a stay. *See* Ex. 11 at 1.

Mr. Woods has filed a notice of appeal. This Court has jurisdiction to grant a stay of execution. See 28 U.S.C. § 2251(a)(1).

Statement of Facts

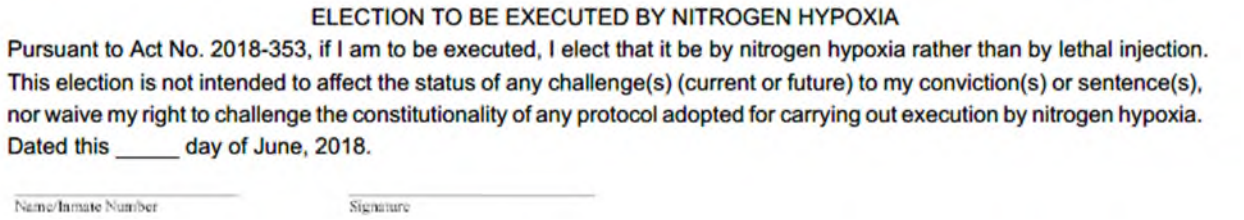
1. *The nitrogen-hypoxia opt-in process.*

Lethal injection is Alabama's default method of execution. Ex. 10 at 4 (citing Ala. Code § 15-18-82.1(a)). On April 6, 2012, inmate Carey Dale Grayson sued the State of Alabama, alleging that the State's lethal-injection protocol (and the secrecy then surrounding it) violated his Eighth and Fourteenth Amendment rights. *Id.* Other death-sentenced inmates eventually filed their own complaints, which were consolidated in the U.S. District Court, Middle District of Alabama, as *In Re: Alabama Lethal Injection Protocol Litigation*, Case No. 12-cv-00316 (M.D. Ala.). *Id.* at 5-6. In that litigation, plaintiffs proposed nitrogen gas as an alternative method of execution. *Id.* at 6.

While *In Re: Alabama Lethal Injection Protocol Litigation* was pending, on June 1, 2018, the State of Alabama amended its laws to allow death-sentenced inmates to choose the manner by which they would be executed: by Alabama's default method of lethal injection or by nitrogen hypoxia. *Id.* at 4. Inmates whose death sentences had become final prior to the amendment's enactment, like Mr. Woods, were given 30 days to make this election. *Id.* (citing Ala. Code § 15-18-82.1(b)(2)). After June 30, 2018, inmates who did not opt into death by nitrogen hypoxia would be deemed to have forever waived their right to make such election. *See id.* at 4-5.

At the time of the amendment's enactment and throughout the 30-day election period, the State of Alabama had not created or implemented a protocol by which it could carry out executions using nitrogen hypoxia. *Id.* at 7; *see also Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1327 (11th Cir. 2019) (noting Attorney General's disclosure that, as of April 2019, "ADOC ha[d] not yet finalized a nitrogen-hypoxia protocol"). As conceded by Appellees in the court below, State officials—such as Appellees—were aware of this. *See* Ex. 3 at 45-46 (State law did not "require[] the ADOC to have a hypoxia protocol in place by the time of enactment or to inform inmates of the status of the protocol's development…. [C]reating a new execution protocol is not a quick or easy process…. Even if the ADOC had been able to create a workable protocol between the approval and enactment dates, that protocol would surely now be the subject of a method-of-execution challenge"). And they were aware of the consequences of it: no executions via nitrogen hypoxia would take place until a protocol was adopted. However, they did not share this information with inmates on death row, including Mr. Woods, during the 30-day election period.

On or after June 26, 2018, Appellee Stewart—the Holman Correctional Facility warden—ordered that an election form be distributed to all death-row inmates. *E.g.*, Ex. 10 at 6. The form consisted of the following, in its entirety:



ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection. This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out execution by nitrogen hypoxia.

Dated this _____ day of June, 2018.

Name/Inmate Number Signature

Mr. Woods did not return the form at that juncture.

2. *Post-amendment executions in Alabama.*

Since June 30, 2018, eighteen (18) Alabama death-sentenced inmates have completed federal habeas review. *Id.* at 5. The State has moved to execute five inmates since that time, believing all of them were scheduled to die by lethal injection: Domineque Ray, Michael Brandon Samra, Christopher Lee Price, Jarrod Taylor, and Nathaniel Woods. *Id.* at 7-8 ("While the State is currently unable to perform nitrogen hypoxia executions, it has proceeded with the executions of death row inmates who have completed their appeals and who did not elect nitrogen hypoxia.").

Domineque Ray

Domineque Ray was executed on February 7, 2019 via lethal injection. *Id.* at 8.

Michael Brandon Samra

Michael Brandon Samra was executed on May 16, 2019 via lethal injection. *Id.*

Christopher Lee Price

Christopher Lee Price desired to be executed via nitrogen hypoxia. On January 27, 2019—more than a month before the Alabama Supreme Court scheduled the execution—Mr. Price asked the warden of Holman Correctional Facility to allow him to be executed by nitrogen hypoxia. *Price*, 920 F.3d at 1322. The warden claimed to "not have the authority to grant, deny, or reject the request," and instead referred Mr. Price and his counsel to the State Attorney General. *Id*. The Attorney General ultimately denied Mr. Price's request, "citing the thirty-day period to opt into the protocol." *Id*.

On February 8, 2019, Mr. Price sued the State in U.S. District Court, raising various constitutional objections to the State's refusal to allow him to die by nitrogen hypoxia. During the litigation of Mr. Price's lawsuit, the State admitted that it did not have a protocol or the means by which to execute individuals via nitrogen hypoxia. *Id.* at 1327. Until that point, the State had not definitively disclosed whether it had an execution protocol for nitrogen hypoxia. Mr. Price's lawsuit eventually was dismissed. This Court affirmed. *Price*, 920 F.3d 1317.

Before this Court entered its mandate, however, the lower court received new evidence (in the form of a final version of a draft report that was at issue) and stayed Mr. Price's execution. *Price v. Dunn et al.*, 1:19-cv-57 (S.D. Ala. Apr. 11, 2019), Dkt. 49. This Court affirmed the stay. *Price v. Dunn*, No. 19-11268-P

(11th Cir. Apr. 11, 2019). On April 12, 2019, the U.S. Supreme Court vacated the stay, *Price v. Dunn*, 139 S. Ct. 1312 (2019), but the execution order expired before the vacatur was communicated to Alabama correctional facilities. In a concurring opinion written a month later, when Mr. Price unsuccessfully sought a petition for a writ of certiorari to challenge the lethal-injection protocol, Justice Thomas explained that vacating the stay in April 2019 was necessary because the district court did not have jurisdiction to enter the stay in the first instance. *Id.* at 1537 (Thomas, J., concurring).

Mr. Price was executed on May 30, 2019 via lethal injection.

Jarrod Taylor

On July 29, 2019, the State moved the Alabama Supreme Court to schedule Jarrod Taylor's execution. *E.g.*, Ex. 4 at 7. As part of the motion, the State represented that Mr. Taylor had not made a timely election of death by nitrogen hypoxia. *Id.* On July 30, 2019, Mr. Taylor's counsel informed the State that Mr. Taylor had, in fact, timely elected death by nitrogen hypoxia. *Id*. A day later, Mr. Taylor's counsel provided the State documentation showing Mr. Taylor's timely election. *Id*. On August 2, 2019, the State moved to withdraw the motion to set Mr. Taylor's execution date. *Id*. In support of the motion to withdraw, the State affirmed that "ADOC is not yet prepared to proceed with an execution by nitrogen hypoxia[.]" *Id.*

3. *Current status of Alabama's Nitrogen-Hypoxia Protocol.*

While the State disclosed in April 2019 that it had not yet created or implemented a protocol or acquired the means to execute Alabama inmates via nitrogen hypoxia, it could have done so at any point in time leading up to the date it moved to sentence Mr. Woods' execution. As a consequence of the State's failure to adopt a protocol, it has indefinitely suspended and postponed the execution of all inmates who elected death by nitrogen hypoxia. To date, no state, including Alabama, has carried out an execution via nitrogen hypoxia.

Statement of the Standard of Review

The issues raised in this appeal require independent reassessment of the proper application of federal constitutional principles to the record facts relevant to the claim. *Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S. Ct. 1708, 1714-15 (1980). Mixed questions of law and fact are reviewed de novo, *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991), as are questions of law, *Collier v. Turpin*, 177 F.3d 1184, 1193 (11th Cir. 1999).

SUMMARY OF ARGUMENT

Before July 1, 2018, the State of Alabama carried out executions in chronological fashion based on when the inmate had exhausted his or her direct appeals, state post-conviction relief, and federal habeas proceedings. Whatever discretion the Alabama Attorney General exercised over in this area was never

challenged because it appeared to be exercised within the bounds of the Constitution. Certainly, that would not be true if the Attorney General's approach changed and he began scheduling executions based on arbitrary factors such as inmate eye color, height, or hair length. Whatever rights death row inmates may be deemed to have forfeited, the Constitution would not tolerate such capricious behavior in the decision-making process of selecting which condemned prisoner should be executed.

That's precisely what transpired in the summer of 2018. Except with a twist. That summer inmates were told to choose between nitrogen gas and lethal injection. What they were not told was the State of Alabama did not have a nitrogen gas execution protocol. What they also were not told—and only became apparent as a consequence of the events pertaining to Jarrod Taylor—was the State of Alabama would be deviating from past practice. Inmates would now, as a threshold matter, be selected for execution based on whether they had chosen to participate in their own execution process in June 2018 and selected nitrogen gas. Of course, being unaware of the implications, Mr. Woods declined to participate in any process that required him to play an active role in his own execution. It's as if the State told him he could choose his hair length and later prioritized his execution based on that unwitting decision. Certainly, had the State not played games with Mr. Woods and disclosed then what only recently became apparent—that in the absence of a nitrogen gas protocol, it would target for execution inmates scheduled to die by lethal injection—

Mr. Woods would have chosen differently. This Court should remedy the State's ongoing violations of Mr. Woods' rights under the U.S. Constitution, Alabama State Constitution, and Alabama state law.

ARGUMENT

I. THE STATE'S PLAN TO EXECUTE MR. WOODS VIA LETHAL INJECTION WILL VIOLATE HIS EIGHTH AMENDMENT RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment prohibits the cruel, arbitrary, and capricious infliction of the death penalty. The State has violated Mr. Woods' Eighth Amendment rights by targeting him for speedier execution based on his refusal to participate in the execution process and concomitant inability to divine that the State had no execution protocol for nitrogen gas and would otherwise proceed with executions for those scheduled to die by lethal injection.

At its core, the Eighth Amendment prohibits the wanton, freakish, and discriminatory infliction of the death penalty. As the Supreme Court has explained, the death penalty should not be deployed in "circumstances under which" it will be "meted out arbitrarily or capriciously or through whim or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1983) (O'Connor, J., concurring in part and concurring in the judgment) (citation and internal quotations omitted) (grammatical alterations omitted). Here, the State has singled out for execution those individuals who declined to participate in the process of choosing

their own deaths. Such targeting is not simply arbitrary and freakish, it is affirmatively discriminatory and serves to punish individuals based on factors divorced from their offense. *Furman v. Georgia*, 408 U.S. 238, 249 (1972) ("A penalty … should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily."). This impermissible targeting, particularly when a consequence of withheld information, is cruel and unusual.

To be clear, this Court does not need to find that the death penalty itself—or even the methods by which Alabama executes people—are cruel and unusual for Mr. Woods to succeed on the merits of is Eighth Amendment claim. Unlike *Price*, this claim does not depend on which drugs Alabama uses in its lethal-injection protocol, or whether there is a safer, more humane alternative. Instead, Mr. Woods need only demonstrate the Alabama Attorney General's approach to scheduling executions creates the risk that death will be imposed arbitrarily and capriciously. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). This risk is intolerable when the State has unfettered discretion in its application of the death penalty, *see id*. at 207 (administration of the death penalty precludes its "wanton[] and freakish[] impos[ition]"), or applies punishment based on a

"morally irrelevant" factor, *see McCleskey v. Kemp*, 481 U.S. 279, 341 (1987) (Brennan, J., dissenting) ("Certainly, a factor that we would regard as morally irrelevant, such as hair color, ... could be associated with sentencing results to such an extent that we would regard as arbitrary a system in which that factor played a significant role.").

Here, the State's targeting rule suffers from each of these defects. No less so than if the Attorney General began scheduling executions based on arbitrary factors such as shirt and hair color, his practice of scheduling executions based on method of execution is wholly arbitrary. Neither the State nor the lower court have gone so far as to suggest the Attorney General has freewheeling authority that has no constitutional limits. Rather, the lower court concluded "[t]he State's conduct in seeking Woods' execution date is not constitutionally suspect" because "Woods did not elect nitrogen hypoxia" and thus "remains subject to execution by Alabama's default execution method." *See* Ex. 10 at 36. In other words, the lower court held the Attorney General's conduct is not arbitrary but rather grounded in inmate "choice." But the premise is flawed because a decision (or indecision) without vital information is no choice at all. The State's successful deployment of a shell game cannot supply a basis for the Attorney General's arbitrary treatment.[1]

[1] The Court's conclusion that the State had no obligation to disclose vital information at the time of election is also flawed for the reasons explained below. *See* Ex. 10 at 35.

II. APPELLEES VIOLATED MR. WOODS' RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment forbids the State from "depriv[ing] any person of life, liberty, or property without due process of law …." In the capital-punishment arena, the Government's obligation to provide due process is all the more critical. Indeed, the Supreme Court has emphasized its "heightened concern for fairness and accuracy" when reviewing "the process requisite to the taking of a human life." *Ford v. Wainwright*, 477 U.S. 399, 414 (1986). How much process is due depends on the situation. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). In assessing the Government's due-process obligations, courts must analyze three distinct factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (citation omitted). These factors weigh in favor of Mr. Woods.

Private Interest Affected by Official Action. Asked to make a critical life decision, Mr. Woods had an interest in understanding all material factors bearing

upon that decision. The State of Alabama suppressed vital information concerning the timing of his execution and failed to provide Mr. Woods a meaningful opportunity to consult with his attorney.

Here, the State's withholding of information implicates Mr. Woods' life interest because Mr. Woods was asked to make a choice that would affect the timing of his death without having any knowledge that his choice carried that consequence. Despite having been sentenced to death, Mr. Woods still has a "residual life interest." *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 (1998) (Rehnquist, C..J., joined by Scalia, Kennedy, and Thomas, JJ.) ("We agree that respondent maintains a residual life interest, e.g., in not being summarily executed by prison guards."); *id*. at 288 (O'Connor, J., concurring in part and concurring in the judgment) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life."); *id*. at 291 (Stevens, J., concurring in part and dissenting in part) ("There is, however, no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does."). Indeed, in *Woodard*, the plurality explained that a death-sentenced inmate has a protected life or liberty interest in a purely discretionary clemency proceeding. If the State chooses to offer a process—like clemency proceedings—the plurality concluded the State must incorporate "some *minimal* procedural safeguards," like notice of the clemency hearing and an

opportunity to participate in the interview, for the proceeding to comport[] with Due Process. *Id.* at 290 (emphasis in original).

In *Ford*, the Supreme Court made clear that "[a]though the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protections of the Constitution altogether." 477 U.S. at 411 (plurality op.). Even in the post-conviction setting, "if the Constitution renders the fact or timing of [the condemned prisoner's] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Id.* Applying these principles, the plurality ruled that Florida's procedures for determining whether an inmate was sane enough to be executed did not comport with the Fourteenth Amendment. These procedures consisted of an in-person interview of the inmate, conducted by a panel of three psychiatrists, while the inmate's attorney was present. *Id.* at 412. The inmate's attorney was not allowed to speak during the interview, nor did the inmate (or counsel) have a right to submit materials for the Governor's consideration. *Id.* at 413. The Court found this process to be "cursory" and "fail[ed] to achieve even the minimal degree of reliability required for the protection of any constitutional interest[.]" *Id.* Justices Stevens and O'Connor joined the four-judge plurality in determining that Florida's sanity-determination procedures "do not … comport

with the requirements of due process." *Id.* at 424 (Stevens, J., concurring) ("Thus, the question in this case is whether Florida's procedures for determining petitioner's sanity comport with the requirements of due process. Together with [the four-judge plurality] and Justice O'CONNOR, I would hold that they do not.").

In contrast to the limited due process afforded the *Woodard* respondent as part of a purely discretionary clemency scheme, and in contrast to the relatively robust due process afforded the *Ford* petitioner, Mr. Woods was deprived of even minimal procedural safeguards during the 30-day period he was required to choose how Appellees would execute him. At a minimum, he was entitled to all relevant information bearing upon his choice, including that (1) the State did not have a nitrogen-hypoxia protocol in place and (2) the State intended to continue executing individuals via lethal injection while indefinitely sparing the lives of inmates who opted into nitrogen gas. But Appellees did not tell him this.

In fact, Appellees actively ***withheld*** this information from Mr. Woods. On June 26 or 27—just days before Mr. Woods was required to make his choice—Appellees distributed a form devoid of any information about the State's lack of a nitrogen-hypoxia protocol or the impact that not opting into death by nitrogen would have on his interests in *living* and avoiding painful death. Appellees' troubling actions deprived Mr. Woods of his constitutional right to notice, "at a

meaningful time and in a meaningful manner." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (citation and internal quotations omitted); *Sessions v. Dimaya*, 138 S.Ct. 1204, 1225 (2018) (Gorsuch, J., concurring) ("Perhaps the most basic of due process's customary protections is the demand for fair notice.") (citations omitted).

The logical extension of the State's position—endorsed by the court below—is that the State can withhold (and even suppress) information about the timing of an execution because a death-row inmate already has received due process in the form of a fair trial, direct appeals, and collateral review. But if this were all the Fourteenth Amendment required, then *Woodard* and *Ford* would mean nothing—and the State could avoid pesky challenges involving the timing of executions by simply never setting a date and instead dragging the inmate out of his cell at a moment's notice, or by determining execution dates by a roll of the dice. Of course, the Fourteenth Amendment would not tolerate such a grotesque denial of due process, particularly where the State affirmatively elects to afford inmates a procedure by which they can obtain relief, whether it is a purely discretionary clemency scheme (*Woodard*, 523 U.S. at 288), or a pre-execution competency hearing (*Ford*, 477 U.S. at 412), or a procedure whereby inmates may choose the method of execution.

Risk of Erroneous Deprivation. The second *Mathews* factor also weighs in favor of Mr. Woods. The State deprived Mr. Woods of vital information necessary

to make a knowing and informed decision surrounding his execution. Without this information, Mr. Woods understood that he was being given a choice between lethal injection and nitrogen hypoxia but did not understand that his election (or non-election) would impact the timing of his execution. He did not understand—because Appellees did not tell him—that, depending on what method of execution he "chose," Appellees would either indefinitely spare his life or arbitrarily (and therefore unconstitutionally) schedule his death. Without this information, Mr. Woods declined to participate in his own execution process. It was not until the State's mistake in pursuing Jarrod Taylor's execution that it became clear it had no execution protocol for nitrogen gas *and*, rather than maintain its prior "first-out of habeas, first-up" execution protocol, it would punish individuals like Mr. Woods' decision who chose not to participate by scheduling their executions.

Mr. Woods could not have protected his residual life interest or his interest in being free from excruciating punishment unless he had sufficient information about the effect of his election on those interests. *See, e.g.*, *Pabon*, 459 F.3d at 249-50 ("[A]n individual cannot exercise his established right to refuse medical treatment in a meaningful and intelligent fashion unless he has sufficient information about proposed treatment. Absent knowledge of the risks or consequences that a particular treatment entails, a reasoned decision about whether to accept or reject that treatment is not possible. We therefore hold that, in order to

permit prisoners to exercise their right to refuse unwanted treatment, there exists a liberty interest in receiving such information as a reasonable patient would require in order to make an informed decision as to whether to accept or reject proposed medical treatment."); *see also Frye*, 402 F.3d at 1127 (in deciding whether to plead guilty, defendant must know and understand the consequences of doing so); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988) (where employee's resignation is obtained by employer's misrepresentation or deception, the employer has "prevented the employee from making a free and informed choice" and thus "deprived the employee of his protected property interest").

Mr. Woods' treatment contrasts with the due process afforded the *Woodard* respondent as part of a purely discretionary clemency scheme, and the process afforded the *Ford* petitioner as part of Florida's pre-execution competency scheme. Unlike the *Woodard* respondent, Mr. Woods was deprived of even minimal procedural safeguards during the 30-day period he was required to choose how the State would execute him. He was entitled to all relevant information bearing upon that choice, including that the State did not have a nitrogen-hypoxia protocol in place. He was entitled to know if he refused to participate in a process that required him to select how he would prefer to be killed, the Alabama Attorney General would target him for speedier execution. And just as in *Ford*—where the inmate was entitled to robust due process before the State could determine a fact

that bore directly on ***when*** he will be executed—Mr. Woods was entitled to procedural safeguards to ensure the State is not arbitrarily basing the timing of his execution on the post-conviction factual finding that he voluntarily "chose" to not opt into the protocol-less nitrogen-hypoxia process. *See Ford*, 477 U.S. at 411.

To prevent the risk that inmates like Mr. Woods would make uninformed decisions, Respondents-Appellees should have disclosed—during the 30-day opt-in period—that there was no nitrogen-hypoxia protocol in place. Or, alternately, the State could revert to its non-discriminatory and fairly administered policy of scheduling executions based only on when an inmate has exhausted his judicial review.

Government Interest. While the State has an interest in the enforcement of its criminal judgments and sentences, *e.g.*, *Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence" and the State has a "strong interest in enforcing its criminal judgments without undue interference from the federal courts." (citations omitted)), none of the procedural safeguards that Mr. Woods requests would meaningfully undermine that interest because they are not unduly burdensome or prejudicial to the State's interest. Mr. Woods seeks only an election process wherein all relevant information is provided and an opportunity to consult with counsel concerning that information.

Moreover, the State's supposed timing interest is offset by its own conduct. That is, the very need for the delay is due to the State's suppression of information. Had the State provided this information in the first instance, Mr. Woods would likely not be advancing this claim and there would be no reason for a delay. *See, e.g.*, *Landrigan v. Brewer*, No. 10-02246, 2010 WL 4269559, at *9 (D. Ariz. Oct. 25, 2010) ("Defendants have never adequately explained their rationale for withholding *all* evidence regarding the drug, and Defendants have now created a situation where a seemingly simple claim that could have been resolved well in advance of the execution must be resolved in five days—and now only eighteen hours due to further protractions created only be [sic] Defendants—without the benefit of Plaintiff having the opportunity to present fact-based arguments.") (emphasis in original), *aff'd*, 625 F.3d 1144 (9th Cir. 2010), *rev'd on other grounds*, 131 S. Ct. 455 (2010).

Finally, the State's proclaimed interest in swift executions is mitigated by the fact that it accepted a certain amount of delay as the inevitable consequence of adopting nitrogen hypoxia. The State was aware when it passed Alabama Code § 15-18-82.1—and gave every death-sentenced inmate the option of nitrogen hypoxia—that it did not have an execution protocol for that method and thus would be unable to perform executions until it did. The State should not then be heard to complain about a slight delay. The State also cannot claim that it has a legitimate

interest in the swift executions of one set of inmates (those who did not opt into nitrogen hypoxia) but not another (those who did so opt).

III. THE STATE IS TREATING MR. WOODS DIFFERENTLY THAN SIMILARLY SITUATED INMATES, IN VIOLATION OF HIS RIGHT TO EQUAL PROTECTION.

To prevail on his equal protection claim, Mr. Woods must show that "the State will treat him disparately from other similarly situated persons," and, unless a fundamental right is at issue, "that the disparate treatment is not rationally related to a legitimate government interest." *Price*, 920 F.3d at 1323 (citations and internal quotation omitted).

Disparate Treatment. Mr. Woods is similarly situated in all meaningful respects to the fourteen (14) other death-row inmates who are eligible to be executed due to the completion of their direct appeals and federal habeas proceedings. However, the State has created two classes of death-sentenced inmates: (1) those whose executions have been indefinitely suspended because they elected, during a 30-day window, a method the State is not prepared to carry out, and (2) those whose executions will proceed because they did not elect to die via nitrogen hypoxia. Mr. Woods falls into the latter category—but only because the State suppressed material information from him. Because Mr. Woods did not stumble into an indefinite suspension of his execution, he has been targeted for execution sooner than similarly situated death-sentenced prisoners solely as a

function of his purported "choice." This is an unconstitutional distinction. *See, e.g.*, *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.").

Appellees argued in the lower court that Mr. Woods is *not* similarly situated to 14 of these inmates because, unlike them, he did not choose nitrogen hypoxia during the June 2018 election period. *See, e.g.*, Ex. 5 at 11 ("Woods is not similarly situated to the electing inmates because, in accordance with state statute, they have chosen to be executed by hypoxia"). Appellees do not dispute that in virtually every material aspect Mr. Woods is similarly situated to other death-row inmates who have exhausted their federal habeas petitions. Instead, they claim the tainted variable Mr. Woods identifies (i.e., the illusory choice) supplies a basis for discriminating among them. This circular logic cannot stand. Appellees cannot utilize unconstitutional methods such as suppressing information to create classes of individuals and then rely upon the fruit of that poisonous tree as a basis for distinguishing among each other. *See Skinner*, 316 U.S. at 541.

Both the State and the lower court have mistakenly attempted to shoehorn this case into this Court's factually distinguishable *Price* decision. But no matter

how many times the State or the district court says it, this case is not *Price*. In *Price*, the equal protection claim was predicated upon alleged disparate treatment where everyone had the same information—i.e., all death-row inmates had an opportunity to opt into nitrogen hypoxia during the same 30-day window. Specifically, Mr. Price argued that "the State violated his Fourteenth Amendment right to equal protection by not permitting him to elect nitrogen hypoxia as a method of execution." *Price*, 920 F.3d at 1323. This Court rejected this claim because "Price had the same opportunity as every other inmate to elect nitrogen hypoxia as his method of execution." *Id.* at 1323-24.

Critically, however, Mr. Price did not raise before this Court the impact of the State's deviation from its long-standing execution-scheduling policy on his Fourteenth Amendment right to equal protection. Nor could he, as Mr. Price was dead by the time the State's deviation became clear following its withdrawal of Jarrod Taylor's execution and the scheduling of Mr. Woods' death. Given the State's deviation in policy, the equal protection violation here lies in how the State is treating people now that its suppression of evidence has been revealed. Where Mr. Price complained that one group of inmates was allowed to opt into nitrogen hypoxia while he was not, here the claim is that the State is indefinitely sparing the lives of inmates who stumbled into more life (by choosing a method of execution that the State cannot carry out) while seeking to kill those inmates who unwittingly

declined the State's misrepresented offer. These are fundamentally different claims, and rather than paint this case with the same broad brush as used by the State and the lower court, it is imperative that this Court analyze the unequal application of the death penalty resulting from the State's recently discovered deviation from its long-standing scheduling policy. When it does so, this Court should find that, unlike Mr. Price, he *is* substantially likely to succeed on the merits of his equal protection claim.

Degree of Scrutiny. Numerous fundamental rights are at issue here, including Mr. Woods' Fourteenth Amendment rights to life and notice as well as his Eighth Amendment to be free from cruel and unusual punishment. Accordingly, strict scrutiny applies. *See, e.g.*, *Furman*, 408 U.S. at 359 n.141 (1972) (Marshall, J., concurring) ("[B]ecause capital punishment deprives an individual of a fundamental right (i.e., the right to life), the State needs a compelling interest to justify it."); *Skinner*, 316 U.S. at 541 (recognizing strict scrutiny applies where the right at issue is "fundamental to [an individual's] very existence and survival" and he would "forever [be] deprived of a basic liberty").

In *Price*, this Court applied the rational basis test, explaining "a rational basis exists for the thirty-day rule—the efficient and orderly use of state resources in planning and preparing for executions." 920 F.3d at 1325. But the use of the rational basis test stemmed from this Court's finding that Mr. Price was not

substantially likely to succeed on the merits of his Eighth Amendment claim that Alabama's lethal injection would cause him severe pain. *Id.* at 1325 n.5. This determination, explained the *Price* Court, was mandated by binding precedent. *Id.* Here, however, Mr. Woods *is* substantially likely to succeed on the merits of his claim that the State has violated his Eighth Amendment rights through its arbitrary and capricious execution-targeting policy—and, as to this claim, there is no precedent binding on this Court. As such, because Mr. Woods has asserted a recognized fundamental life interest, strict scrutiny applies.

To survive strict scrutiny, the State must supply a compelling government interest in withholding information from inmates and targeting for execution those who declined to participate in the election process. *See id*. There is no compelling reason—or even a rational basis—for withholding such information or targeting. Nor have Appellees ever articulated one. In fact, by virtue of passing Alabama Code § 15-18.82.1, the State was fully prepared for delay, as all death-sentenced inmates had the ability to opt for nitrogen hypoxia. As such, it cannot claim urgency as an interest that warrants depriving an individual of the opportunity to make an informed decision or hasten painful executions.

Moreover, even if the rational basis test were applied, Mr. Woods would prevail. Unlike "the efficient and orderly use of state resources in planning and preparing for executions" that served to justify the thirty-day rule under *Price*, 920

F.3d at 1325, there is no rational basis for suppressing information—i.e., that which supplies a basis for treating similarly situated inmates differently.

IV. APPELLEES VIOLATED MR. WOODS' RIGHTS UNDER ALABAMA STATE LAW BY MISREPRESENTING AND SUPPRESSING MATERIAL INFORMATION.

Fraudulent Misrepresentation. To make out a claim of fraudulent misrepresentation under Alabama law, a party must demonstrate (1) a false representation, (2) concerning a material fact, (3) upon which the plaintiff relied, (4) resulting in injury to the plaintiff. *See Int'l Resorts, Inc. v. Lambert*, 350 So. 2d 391, 394 (Ala. 1977). All four elements are met here.

Defendants wrongfully withheld from Mr. Woods information about the impact of not opting into nitrogen hypoxia during the 30-day election period. When they provided Mr. Woods the bare-bones and constitutionally infirm election form just days before the deadline, Defendants effectively represented to Mr. Woods that he was making a decision regarding his preferred method of execution. But they failed to inform him that, because the State of Alabama did not have a nitrogen hypoxia execution protocol, he was also making a decision (or indecision) regarding the timing of his execution. This false representation constituted a material existing fact, namely the timing of his execution. As a result of this misrepresentation, Mr. Woods elected not to participate in a decision concerning his own execution. Had he known his execution would occur more quickly if he

opted for nitrogen hypoxia, he would have made a different choice. Accordingly, Mr. Woods was proximately damaged in the form of imminent death as a consequence of Defendants' false representation.

Fraudulent Suppression. Mr. Woods also has established that Defendants fraudulently suppressed material evidence. To prevail on this claim, Mr. Woods must show that (1) Defendants had a duty to disclose an existing material fact; (2) Defendants suppressed that existing material fact; (3) Defendants had actual knowledge of the fact; (4) Defendants' suppression of the fact induced Mr. Woods to act or to refrain from acting; and (5) Mr. Woods suffered actual harm as a proximate result. *State Farm Fire & Cas. Co. v. Owen*, 729 So. 2d 834, 837 (Ala. 1998). Mr. Woods satisfies all five elements.

Defendants owed a duty to Mr. Woods to disclose it did not have a nitrogen hypoxia protocol in place throughout June 2018 and, as such, not electing to die via nitrogen gas effectively would speed up Mr. Woods' death. A duty to disclose can arise from the circumstances of a case, such as the parties' relationship and their relative knowledge, the value of the information, and the plaintiff's opportunity and ability to ascertain the fact. *See State Farm Fire & Cas. Co*, 729 So. 2d at 842-43. As a death-sentenced inmate, Mr. Woods is uniquely disempowered vis-à-vis the defendants. He is dependent on them in most every respect.

Defendant Stewart is entrusted with Mr. Woods' well-being. *See e.g.*, Ala. Code § 14-3-13 (corrections officers' duty requires they not "ill treat or abuse any convict under [their] charge or control"). Both Defendants Dunn and Marshall took an oath to "support the Constitution of the United States" and to "faithfully and honestly discharge the duties of the office upon which [they were] about to enter." *See* Ala. Const. § 279. In addition to owing Mr. Woods a duty as a consequence of these obligations, Defendants owed him a duty to disclose based on their asymmetrical knowledge. Defendants had actual knowledge that (1) the State did not have a nitrogen-hypoxia protocol and (2) inmates who did not elect death by nitrogen gas would be executed more quickly than those who had opted into nitrogen. By contrast, at the time he was required to choose how he would die, Mr. Woods had no knowledge the State did not have the means to conduct executions using nitrogen gas or what impact not electing execution by nitrogen hypoxia would have on the scheduling of Mr. Woods' death. In addition, Defendant Stewart ordered her staff to distribute a form to Mr. Woods, purportedly to elicit his choice of how he wanted the State to kill him. This was done despite Defendants knowing they had no way to carry out nitrogen-gas executions, yet they did not mention this material fact, on the form or otherwise.

Defendants' suppression of material facts relating to Mr. Woods's execution induced him to refrain from opting into death by nitrogen gas. Had Defendants

fulfilled their duties and not suppressed material facts, Mr. Woods would have opted into death by nitrogen gas during the timeline established by Alabama Law. *See* Ala. Code § 15-18-82.1. As a proximate cause of Defendants' fraudulent suppression, Mr. Woods has suffered actual harm by being targeted for speedier execution due to his purported failure to knowingly and voluntarily opt into death by nitrogen gas.

* * *

In far less significant circumstances, courts have recognized that where, as here, the government misrepresents the terms of an offer, the resulting agreement is invalid. Indeed, "[u]nder the implied duty of good faith and fair dealing, the Government maintains an implied duty to disclose information fundamental to the preparation of estimates or contract performance." *E.g., Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 674 (1994). Therefore, "where the Government possesses special knowledge not shared by the contractor, which is vital to the performance of the contract, the Government has an affirmative duty to disclose such knowledge. *It cannot remain silent with impunity*." *Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364, 1371-72 (Ct. Cl. 1972) (citing *Helene Curtis Indus. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963) (emphasis added)). This is true even though the Government is not a fiduciary for its contractors, in large part because "the Government—where the balance of knowledge is so clearly

on its side—can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word." *Helene Curtis Indus.*, 312 F.2d at 778. Yet here, Defendants would have this Court believe the State *can* remain silent with impunity despite having superior knowledge of information that was critical to a decision that impacted whether Mr. Woods would die within months or would have his life indefinitely spared. If contract principles obligate the State to disclose material information to asphalt suppliers and elevator maintainers, then surely Alabama law and the Fourteenth Amendment compel the State to divulge life-saving facts in order to avoid betraying a death-row inmate into a ruinous decision. Though seemingly suggesting otherwise, Defendants cite no "death row inmate" exception that would confer upon the State less of an obligation to Mr. Woods than it has to routine contractors.

V. THE ALABAMA ATTORNEY GENERAL CREATED AND IMPLEMENTED A "RULE" IN VIOLATION OF THE ALABAMA ADMINISTRATIVE PROCEDURE ACT AND, THEREFORE, THE RULE IS INVALID.

Section 41-22-5(a)(1) of the Alabama Code provides that, "[p]rior to the adoption, amendment, or repeal of any rule, the agency shall … [g]ive at least 35 days' notice of its intended action." This notice must "[a]fford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing" and the agency "shall consider fully all written and oral submissions respecting the proposed rule." *Id*. (a)(2). If an agency does not comply with these

requirements, the rule will be considered invalid. *Id*. (d). Summary judgment is appropriate because, even when viewed in the light most favorable to Defendants, the facts clearly establish clear that (1) Defendant Marshall's execution-scheduling policy is a "rule" as defined by the AAPA, and (2) Defendant Marshall and his agency did not comply with the AAPA's notice requirements.

The AAPA defines a "rule" as:

> Each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency and includes any form which imposes any requirements or solicits any information not specifically required by statute or by an existing rule or by federal statute ….

Ala. Code. § 41-22-3(9). Defendant Marshall's policy is a rule of "general applicability," as it applies generally to all death-sentenced inmates.

Because Defendant Marshall's execution-targeting policy is a "rule" under the AAPA, he was required to comply with the AAPA's notice provisions. He did not. As such, Defendant Marshall's rule is invalid as a matter of law—and summary judgment for Mr. Woods on this claim is appropriate. *See* Ala. Code § 41-22-5(d).

In the court below, Appellees did not even attempt to explain how the Attorney General's execution-scheduling policy is not a "rule" as defined by the Alabama Administrative Act. Dkt. 25 at 13-14. Nor do Appellees muster an

argument that somehow the AAPA does not apply to the Attorney General or suggest that the Attorney General did in fact comply with the AAPA's notice requirements. Id. Instead, Appellees concluded—again, without any analysis or legal support—that the Attorney General did not create a rule when he started seeking execution dates based on whether an inmate had opted into nitrogen hypoxia. How Appellees reached this conclusion is anybody's guess, but the undisputed facts establish that the Attorney General's execution-scheduling policy is a "rule" as defined by the AAPA, as it is an "agency regulation, standard, or statement of general applicability that implements … law or policy[.]" *See* Dkt. 22 at 29-30 (quoting Ala. Code § 41-22-3(9)).

CONCLUSION

The undisputed facts here show that the State is selecting inmates to die not based on any objective measure but rather on the arbitrary consideration of whether they stumbled into selecting the method of execution that would result in a delay. Whatever discretion an Attorney General may have surrounding execution scheduling, it does not extend so far as to allow for such arbitrary treatment. Had the State informed inmates that this was the likely outcome of choosing a particular method, perhaps we might not be here today. But it did and, in so doing, it violated Mr. Woods' state and federal rights. The lower court erred in granting

summary judgment to the State and in denying summary judgment in favor of Mr. Woods. Its determination should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,809 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Rule 32-4 of the Eleventh Circuit Rules. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X5, in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that, on March 3, 2020, I served a copy of the foregoing upon counsel for Defendants by filing the same via the Court's CM/ECF system, which shall cause the same to be electronically transmitted to: **Steve Marshall** and **Lauren Simpson**.

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